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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 200

JOSEPH SPATUZZA and JAMES COZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 331 F. 2d 214.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1964. A petition for rehearing was denied on May 21, 1964. The petition for a writ of certiorari was filed on June 19, 1964. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an answer given by a government agent on cross-examination, which the jury were instructed to disregard, required reversal of petitioners' convictions.

2. Whether the trial court erred in its instructions to the jury.

3. Whether the indictment properly described the premises from which the goods in question were stolen.

4. Whether the trial court abused its discretion in limiting the time for argument to the jury.

STATUTE INVOLVED

18 U.S.C. 659 provides, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> * * * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

STATEMENT

Petitioners and two co-defendants were indicted in the United States District Court for the Northern District of Illinois for unlawfully buying, receiving and possessing a trailer load of cosmetic products, valued at more than $100, stolen from a depot of the New York Central System located at Chicago, Illinois, which goods were moving as and constituted an interstate shipment of freight (1 R. 9). Co-defendant Bravieri pleaded guilty (1 R. 3). After a jury trial, the other defendants were convicted of illegal possession (1 R. 162-163, 6-7). Petitioner Spatuzza was sentenced to imprisonment for a period of four years and petitioner Cozzo for a period of two years (1 R. 166-169). Co-defendant LaPore, sentenced to imprisonment for four years, did not appeal (1 R. 7). The court of appeals affirmed, 331 F. 2d 214.

1. On December 20, 1962, the Bristol-Meyers Co. shipped a truckload of cosmetics, valued at $37,600, from Hillside, New Jersey, to the Cosmetics Distributing Company in Chicago, Illinois. The cosmetics were placed in trailer No. 6905 of the New York Central Transport Co., which was transported piggy-back over the New York Central Railroad to Chicago and

placed in a yard of the Transit Co. (1 R. 12-13, 25-27, 110-112). On December 26, the consignee refused delivery because it was unable to unload, and the trailer was returned to the yard. On the following day, the trailer had disappeared from the yard (1 R. 28-33, 40-41).

On January 14, 1963, F.B.I. agents were surveilling a garage located at 1302 West Erie Street in Chicago, on the north side of the street. About 8:00 p.m. agents Daniels and Kavanagh, stationed about 200 yards east, saw three men get out of a green 1956 Ford which parked in front of the garage. The driver, who wore a light colored jacket, was seen to return to the Ford twice. Shortly afterward, a red tractor truck arrived and parked just west of the garage entrance, which was temporarily blocked by a milk truck (1 R. 52-54, 66-67).

At this juncture Daniels and Kavanagh moved to another position, while agents Grundler and Malone replaced them. The newly arrived agents saw the red truck backed partially into the garage after the milk truck drove away. In order to get a better view, the agents moved forward to a point 150 to 180 feet east of the garage. A few minutes later, they saw that some difficulty was being encountered in getting the truck out of the garage and saw the defendants LaPore and Spatuzza climb up on the cab to get it out. LaPore and Cozzo then went into the street to direct the traffic and to halt oncoming traffic. After this was accomplished, they were seen starting to walk toward Elizabeth Street, a north-south street which dead-ends about the eastern side of the garage.

The truck and the Ford started eastward on Erie Street. The truck, which proved to be New York Central Transport truck No. 6905, was intercepted by Grundler and Malone, who arrested the driver, co-defendant Bravieri (1 R. 74-75, 94-96). Another F.B.I. agent stopped the Ford immediately behind the truck and arrested the driver, Spatuzza (1 R. 107-108).

Agents Daniels and Kavanagh, who had moved to a point on Elizabeth Street about 110 yards south of the garage, saw the truck and Ford drive off. They saw the man who had been directing traffic at the intersection walk south on the east side of Elizabeth Street, while another man in dark clothes walked on the west side. Agent Daniels started the car and drove it up Elizabeth Street. As agent Kavanagh jumped out of the car, the man on the east side (co-defendant LaPore) called out "Police, police". The man on the west side escaped down an alley which intersected Elizabeth Street in the middle of the block (1 R. 55-57, 68-69). Petitioner Cozzo, who was arrested three days later, was identified by Daniels as the man who had escaped down the alley. He was also identified by Grundler and Malone as one of the men they had seen in front of the garage from their observation point 150 to 180 feet east (1 R. 57, 75, 94-96).

2. The contention principally stressed in the petition relates to a statement made by agent Grundler on cross-examination relative to his means of identifying petitioner Cozzo prior to the latter's arrest.

Agent Daniels was the first of the agents to testify. After his identification of Cozzo in the courtroom, he was asked on cross-examination by counsel for Cozzo about his prior identification. He stated that, at the F.B.I. office, before going out on surveillance, agent Grundler had briefed him and the other agents and had showed them various photographs of "possible suspects." Daniels remembered this man's face, but not his name. After the arrests had been made, Daniels returned to the office and identified Cozzo from his photograph. Kavanagh, acting separately, had done the same (1 R. 61-62).

Grundler, who testified thereafter, was also asked on cross-examination by counsel for Cozzo about his earlier identification of Cozzo (1 R. 79):

> Q. And who gave you the photograph, if anyone?
>
> A. That photograph is available along with many other photographs of known cartage thieves that we keep and—

He was interrupted by motions for mistrial on behalf of both petitioners. The court denied the motions, pointing out that it had already been brought out by cross-examination that the photographs were from the F.B.I. files. The court said it would sustain a motion to strike the answer, which motion was thereupon made and sustained. A motion on behalf of Spatuzza for severance was denied (1 R. 79-84).

Although the court had instructed the jury to disregard the answer given, the cross-examiner asked Grundler if he did not know that Cozzo had never

been convicted of a cartage theft, to which the witness replied that he did not know of his own personal knowledge. He was asked if he did not know that there was no record in the F.B.I. files of such a conviction, whereupon the attorney for petitioner Spatuzza objected and moved for a severance. The objection was sustained but the severance denied (1 R. 89). Exception was also taken to the refusal of the court to permit the question, "Have you received any special training as a witness?" (1 R. 85).

ARGUMENT

1. Contrary to petitioners' assertion, the identification of Cozzo at the trial depended not at all upon an examination of photographs. Agents Grundler and Malone observed Cozzo in various movements in front of the garage, from a distance of between 150 and 180 feet. Agent Daniels saw him as they approached each other from opposite ends of the block on Elizabeth Street until Cozzo reached the alley in the middle of the block. All three agents made their identification from Cozzo's personal appearance in court. Accordingly—unless to invite prejudicial error—there was scant reason for the defense to probe the fact that Cozzo's name was first learned from a photograph in the F.B.I. files.

Cozzo's own counsel elicited, on cross-examination of agent Daniels, that the F.B.I. had Cozzo's photograph prior to his apprehension and that it was included among a group of photographs shown to the investigative agents as those of "possible suspects" involved

in the crime (1 R. 58-59, 61). While the abbreviated record filed here [1] does not disclose the questions which brought out these facts, no complaint was made then (and none is made now) that the witness's answers were unresponsive or otherwise objectionable. Yet, that testimony in effect revealed what agent Grundler was later to say, that Cozzo's photograph was associated with those of "known cartage thieves" in the F.B.I. files.[2] In any event, it was counsel's deliberate choice to pursue this wholly unnecessary and dangerous line of inquiry that prompted the statement now so strongly objected to. Although it had already been brought out that he had shown photographs to the other agents, Grundler was asked who gave him the photograph, if anyone. Construing the inquiry as asking where he obtained the picture, the agent in effect responded, "from the file on known cartage thieves." The answer perhaps volunteered too much. But the error, if any, was invited and, under the circum-

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[1] Petitioners' original "Appendix" (1 R.) and an "Additional Appendix" (2 R.) in the court below constitutes the entire record here. For the most part, the testimony is printed in narrative form without counsel's questions.

[2] Strictly speaking, petitioners are correct that previous testimony had not explicitly placed the photograph in the F.B.I. "files," and that the trial judge was apparently under a misapprehension on the point (see 1 R. 83). But it is difficult to appreciate the importance of this formal discrepancy. The jury was informed that petitioner Cozzo's photograph was at the F.B.I. office *before* he was seen in possession of the stolen goods and before his arrest. Surely, a fair inference (absent any explanation) was that the photograph was a part of the criminal files.

stances, did not require a mistrial. The admonition of the court to disregard the answer was an adequate method of dealing with the situation. *Stopelli* v. *United States*, 183 F. 2d 391, 394 (C.A. 9), certiorari denied, 340 U.S. 864; *United States* v. *Curzio*, 179 F. 2d 380 (C.A. 3); *United States* v. *Giallo*, 206 F. 2d 207, 209 (C.A. 2), affirmed 346 U.S. 929; *United States* v. *Apuzzo*, 245 F. 2d 416 (C.A. 2), certiorari denied, 355 U.S. 831.[3]

Petitioners' further allegation that the record is "replete with efforts on the part of the prosecutor to inject incompetent evidence" (Pet. 15) is not documented. Counsel cite no instances. No such efforts appear in the record submitted. Nor can this properly be characterized as a "close" case (Pet. 15). All four defendants were caught in the act of dealing with a stolen trailer and its contents in a manner that was wholly inconsistent with any theory of innocence. While petitioner Cozzo escaped and was not apprehended until three days later, no effort was made on his behalf to establish an alibi.

2. Petitioners contend that the instructions did not adequately define the elements of the offense charged. The court instructed (1 R. 133-134):

> The indictment in this case charges that the defendants, Anthony LaPore, Joseph Spatuzza and James Cozzo, on or about January 14, 1963,

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[3] Petitioner Spatuzza's claim of prejudice is plainly without merit. He was not implicated in the revelation that this co-defendant's photograph was in the criminal files of the F.B.I.

did buy, receive and unlawfully have in their possession certain goods and chattels of a value in excess of $100 to-wit, a trailerload of approximately 3,000 cartons of cosmetic products, including Mum, Vitalis, Sal Hepatica and Trig, which goods and chattels had been stolen and unlawfully taken and carried away from a depot of the New York Central System located at Chicago, Illinois, and which goods and chattels were then and there moving as part of an interstate shipment of freight from Hillside, New Jersey, to Bristol-Meyers Products Division, Cosmetic Distributing Company, Chicago, Illinois, said defendants well knowing that said goods and chattels had been embezzled and stolen in violation of Section 659, Title 18, United States Code.

That section in question makes it a crime to buy, receive or unlawfully have in your possession goods and chattels stolen from an interstate shipment.

It is not necessary for the government to prove that the defendants bought, received and had in their possession under the statute in question. It is sufficient if the government establishes that the defendants either bought or received or possessed.

I will say to you at this time that the evidence presented by the government is not sufficient to establish that these defendants bought or that they received, and you have before you simply to decide whether they had in their possession merchandise which was stolen from interstate shipment and which they knew to have been stolen from interstate shipment.

No dispute existed as to the interstate nature of he shipment or as to the value of the merchandise,

which was shown to exceed $37,000. The charge plainly says that the jury must find possession of the merchandise to have been with the knowledge that it had been stolen. Petitioners complain that in one passage such knowledge was not stated as a requirement, but the court was there merely explaining that possession of stolen property was sufficient to constitute the offense without proof that defendants had bought or received it. Both before and after this explanation it was made clear that such possession must be knowing and the court expressly cautioned the jury that the instructions must always be read together (1 R. 127-128).

Error is also claimed because of the denial of a "falsus in uno" instruction and the credibility instruction given in its stead is challenged as incorrect. As was pointed out by Judge Parker in *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405 (C.A. 4), the rule expressed in the requested instruction "has been watered down until it means no more now than that the jury may disbelieve a witness if they think he is lying". See, also, Wigmore, *Evidence* (3d ed.) §§ 1008-1013. The charge given (1R. 131-132) was taken from the suggested instructions appearing at 27 F.R.D. 39, 67-68. The statement that a witness is presumed to tell the truth is so qualified by the following portions of the instruction that there is no realistic danger that a jury would misunderstand it.[4]

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[4] The criticism by Judge Brown, concurring, in *Knapp* v. *United States*, 316 F. 2d 794, 795 (C.A. 5), was based upon the use of a similar charge in conjunction with another instruction

3. The place from which the merchandise was stolen was described in the indictment as "a depot of the New York Central System located at Chicago, Illinois" (1 R. 9). There was no motion to make this allegation more specific. A "depot" is defined by Webster as a "place of deposit for goods". It is generally understood to include any place customarily used for the receipt and storage of freight either for transportation or for delivery to the consignee. *Humphreys* v. *McKissock*, 140 U.S. 304, 313; *Maghee* v. *Camden & Amboy R.R. Co.*, 45 N.Y. 514, 520; *State* v. *New Haven & N. Co.*, 37 Conn. 153, 163; *Plunkett* v. *Minn. S.S.M. & A.R. Co.*, 79 Wis. 222, 48 N.W. 519. The mere fact that the trailers were stored in a yard, rather than in a building, is immaterial. Nor can any significance be attached to the fact that it is referred to as a depot of the New York Central "System". Transportation here was by way of the Transportation Company and the Railroad, the yard in question serving both. The description used was thus appropriate.

4. At the conclusion of the evidence, the government requested an hour in which to argue its case. Petitioners Spatuzza and Cozzo requested thirty and forty-five minutes, respectively. The court allowed the government a total of forty-five minutes for opening and closing and each of the three defendants twenty

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there given that a presumption is in inference which the law requires the jury to make from particular facts. See *United States* v. *Green*, 327 F. 2d 715, 719 (C.A. 7), in which this distinction is pointed out.

minutes, or a total of one hour (2 R. 2-4). This was adequate for a simple case where the sole disputed issue involved events taking place over a period of approximately forty-five minutes and as to which only five witnesses testified. The time limitation fixed by the court was a reasonable exercise of its discretion. *United States* v. *Kay*, 101 F. 2d 270 (C.A. 2), certiorari denied, 306 U.S. 660; *Cases* v. *United States*, 131 F. 2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770; *Medlin* v. *United States*, 28 F. 2d 663 (C.A. 5); *Samuels* v. *United States*, 232 Fed. 536 (C.A. 8). *Wagman* v. *United States*, 269 Fed. 568 (C.A. 6); *Moorehead* v. *United States*, 270 Fed. 210 (C.A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH SPATUZZA and JAMES COZZO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF OF RESPONDENT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

Under this heading counsel for the government misapprehends and misstates petitioners' Question Number 3 (p. 4 of Petition) in stating it to be "Whether the indictment properly described the premises from which the goods in question were stolen." (p. 2 Gov. Br.). We do not question the indictment description, but do question the proof to support it.

ARGUMENT.

I.

The argument of the government on the question of error arising from the volunteered statement of Agent Grundler, departs from fact and is deceptive in its representations.

The picture of Cózza from which identification of him was made by agents was never shown to be one from the "files" of the F.B.I., even when Grundler blurted his answer (R. 79) in the following exchange,

"Q. And who gave you the photograph, if anyone?"

"A. That photograph is available along with many other photographs of known cartage thieves that we keep and ....."

Just prior to this, Grundler said, "Mr. Cozzo I identified from a photograph in our office." (R. 79).

This last was also the effect of the testimony of Agent Daniels.

To pretend there is no difference between a "photograph in our office," and "photographs of known cartage thieves" is ridiculous and bold deception in argument.

The prejudice mounted when counsel for Cozzo was thwarted by objection and Court ruling from demonstrating that Cozzo was not in fact a "known cartage thief."

The attempt of the government in its answer, at page 8, to distort Daniels' testimony to a statement of "known cartage thieves", is gross and unjustified exaggeration.

Prior to Grundler, no one used the term "known cartage thieves", and he did not say the photograph came from F.B.I. files.

In the same paragraph on page 8 of the answer, the government placed in dishonest and inaccurate quotes the words "from the file on known cartage thieves." This alleged quote was never uttered during the trial.

Cozzo was not identified at the scene, contrary to the government's misrepresentative statement in opening its argument at page 7.

Agent Malone said he was not able to identify Cozzo until he saw him in the F.B.I. office three days later. (R. 100). Agent Daniels made the identification by consulting photographs (R. 59, 61, 62). Grundler identified Cozzo from a photograph at the office. (R. 79).

These are the three agents who testified that Cozzo helped stop traffic so the trailer could depart and that then he walked away and disappeared. Daniels was the only one who said he ran.

It is submitted that interrogation concerning the photographs and their source was logical and a duty of defense counsel.

The defendant was entitled to protection from enforcement officers of experience who seek to inject inadmissible and false evidence to prejudice the defense. The Court's action was not sufficient to protect, and nothing short of declaring a mistrial would be sufficient. Of course, the damage spread to all defendants by implication.

This was a close case and the prosecutor did make repeated attempts to inject and did inject inadmissible prejudicial evidence.

The testimony of the witness, Leo F. Kaminecki (A. 47), was stricken (A. 52) on the theory that it pertained to an offense not charged in the indictment and thus was recognized as prejudicial by the trial Judge. (A. 47-52)